

THE STUDY OF MAN

DESEGREGATION, LAW, AND SOCIAL SCIENCE

What Was the Basis of the Supreme Court's Decision?

MORROE BERGER

WHEN, in May 1954, the Supreme Court held that segregation in public education was unconstitutional, it brought to a head another question that is less immediately explosive but perhaps equally important for the future of our legal system. The nine Supreme Court justices unanimously found that segregation in the public schools implies the inferior status of Negro children and retards their "educational and mental development." And it added that "this finding is amply supported by modern authority." In what has now achieved a certain fame as "footnote eleven," Chief Justice Warren cited the works of eight social scientists as "modern authority." Here, then, is the crux of the question. To what extent did the Court base its decision on the findings of social science? And if the Court relied on social science to a significant degree, how does this tendency affect the future of both American jurisprudence and American social science?

Among those who deplored as well as among those who welcomed the end of segregation's legality, there are many who agree that the Court relied mainly on social science in com-

ing to its decision. But not all agree that such reliance is either beneficial or justifiable. Some wonder whether social science is sufficiently "scientific" to provide a firm basis for legal decisions; others ask whether social science may not itself be harmed by having to bear such a heavy burden of responsibility in "practical affairs."

A little social science can of course be a dangerous thing. Those lawyers (and a very few social scientists) who are disturbed by the Court's apparent confidence in the findings of social research may have a point—for judges may not be adept at using these findings. It is one thing for a judge to consider the testimony of social scientists called in as experts, just as he may consider the testimony of doctors, ballistics experts, and engineers. But it is quite another thing for a judge himself to play the part of social scientist by trying to decide not only if social science findings are relevant to a given problem, but also what the findings are themselves. And it is also easy for a judge to overestimate the validity of what he thinks are "findings."

The absurd extent to which such misconceptions can go may be seen in two instances that occurred about a decade ago, when the social sciences in their present form were beginning to exercise an influence on judicial proceedings and rulings. In a case before the New York State Supreme Court, a woman sought to deny her husband, from whom she was legally separated, the right to visit a daughter born to her by artificial insemination at a time when the couple were still united. The judge told her counsel: "If you are successful here, the child will be established as illegitimate. How will that help the child?"

THIS month marks the third anniversary of the Supreme Court's historic decision declaring segregation in the public schools unconstitutional, and MORROE BERGER here seeks to assess how far the Court was influenced in its decision by the findings of modern social science—and indeed what the role of social science in jurisprudence can and ought to be. Mr. Berger is assistant professor of sociology at Princeton University. He is author of the recently published *Bureaucracy and Society in Modern Egypt* (Princeton), *Racial Equality and the Law* (1954), and other works.

This court will not lend itself to making any child illegitimate. It would be inhumane, inhuman and contrary to the highest precepts of sociology." To this judge the "precepts of sociology" were apparently moral judgments, rather than statements about human behavior that all of us interpret according to our own moral conceptions. For him, sociology was a kind of scientific (therefore higher) ethic.

A more serious misapplication of social science in the courts occurred after World War II, when the New York City police, in an effort to restrain juvenile delinquency, launched a campaign to hold parents responsible for their children's misdeeds. In this move to visit the sins of the children upon the parents, the police were encouraged by many amateur social scientists who drew what seemed to themselves the "obvious" conclusion from "sociological" evidence: that juvenile offenders came from "bad" homes. When the community was faced with the consequences of this brand of "enlightened" law enforcement, it drew back in horror. The confrontation took place in 1947. A judge in the Domestic Relations Court sentenced the mother of a fourteen-year-old delinquent boy to a year in jail. "By your own acts," he told the mother, "you encouraged delinquency in your child. How could it be different with your way of living? Drink after drink—living in one apartment after another with various men." The director of the Society for the Prevention of Crime (Edwin Lukas, now head of the National Affairs Department of the American Jewish Committee) pointed out that the mother had come to this country when she was eight years old, was married off at nineteen to a much older man, had two children by the time she was twenty, and had been abandoned by her husband and left to support the children as best she could. Applying the judge's own reasoning, Mr. Lukas pointed out that "just as children are seen as the products and victims of their environment, so are parents products and victims, too." If the mother of the boy was the guilty one, how about *her* mother? The most eloquent verdict on this kind of "sociological" approach came after the mother had served several months of her jail sentence: she was committed to a hospital for the criminally insane. Her attorney commented: "The court sentenced a woman to jail for failing to be responsible for her son's behavior when actually she was not even legally responsible for her own."

THE usefulness of social science in the courts is only one aspect of the broader question of its role in the solution of what are called "practical" problems, that is in public affairs. The rapid multiplication of social problems (or the increase in the public awareness of them) beginning with the depression of the 1930's was accompanied by new tendencies in social science that have convinced potential consumers of research that it would be of help to them. Civic agencies, corporations, and government at all levels have been spending increasing amounts of money on social research. The Federal government leads in all this, disbursing over \$50 million annually.*

Just as lawyers and constitutional experts are uncertain about the relevance and value of social science for the law, so is the government divided on the usefulness of social research for administration. Opinions in the legislature range from enthusiastic and hopeful support to impatient dismissal of it as a waste of money. Senator McClellan, for example, in 1953 opposed appropriations for studies of Russian and satellite vulnerability: "What do you get, just a lot of professor theories and all that stuff? Is that what you get out of it? To me, that is simply throwing money away, nothing else. If we have not sense enough in the Army and the Navy and the Defense Department and as American citizens to know how to counteract Soviet propaganda without hiring a bunch of college professors to write out a lot of theories, this Defense Department is in one darn bad shape in my opinion."

This rejection of research in favor of "common sense" probably expresses the private feelings of most Congressmen. But there is an influential group of legislators who doubt the adequacy of the "common sense" approach. In 1952 the Cox committee investigating the foundations remarked: "Few individuals feel themselves qualified to express an expert opinion on nuclear fission or the value of isotopes but most of us will not hesitate to express our

*This amount is three times that spent for similar purposes fifteen or twenty years ago, according to a Brookings Institution report. Social research, however, now represents a much smaller proportion of the government's total scientific research budget—2 per cent, compared with 24 per cent in 1937. Funds for research in the physical sciences—physics, chemistry, biology, and so on—have increased at a much faster pace. Most of this research, in both the social and the physical sciences, is related to defense needs.

opinions on such homely subjects as divorce, the causes for the increase in the cost of living, the psychological effects of segregation, the increase in juvenile delinquency, or the impact of television on the study habits of children. But these and other subjects within the orbit of the social sciences are proper subjects for objective study and analysis under conditions of control which give promise of revealing scientific facts."

The introduction of social scientific evidence in judicial proceedings goes back further than the recent controversy over its place in the 1954 segregation cases would indicate. For half a century now, law has known the "Brandeis brief," an early use of social research in the courts. This is one of those innovations which are hailed as revolutionary by specialists but seem tame, if not obvious, to non-specialists.

In 1908 Louis D. Brandeis, not yet on the bench, represented the State of Oregon before the Supreme Court. The constitutionality of Oregon's law limiting women to an eight-hour work day in factories was being challenged on the ground that it restricted freedom of contract unreasonably and hence violated the "due process clause" of the Fourteenth Amendment. For twenty years the Supreme Court had been declaring social legislation enacted by the states unconstitutional on the ground that, according to the social philosophy of the judges, it was an "unreasonable" restriction of freedom. To save the Oregon law, therefore, Brandeis had to show that the restriction of the working day for women in factories to a maximum of eight hours was a "reasonable" (hence not unconstitutional) means to protect "public health, safety, morals, or welfare." He submitted a long brief that made only a cursory legal argument, but offered about a hundred pages reviewing American and foreign legislation restricting the working day for women and quoting many authorities on the ill effects of long hours of work.

Although the Court received the Brandeis brief favorably and upheld the Oregon law, Brandeis's biographer, Alpheus T. Mason, has suggested that the elaborate brief was not the basis of its decision. Instead, says Professor Mason, the court apparently relied on "common knowledge" about women's physical capacity and the need to protect them through law, "rather than on the knowledge gained from Mr. Brandeis's brief." Yet Professor

Mason's point does not tell the whole story. It is true that the Court rested its decision on the ground that the physical vulnerability of women and the importance of their health to the "well-being of the race" were "matters of general knowledge"; therefore the Court did not rely on the social research contained in the Brandeis brief. But it is clear from the decision that the brief did convince the Court about something: that such views about the physical capacity of women were indeed "matters of general knowledge" of which it was entitled to take "judicial cognizance." Although the Brandeis brief presented facts and opinions which, according to the Court, might not be "technically speaking, authorities," yet, the Court added, "they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation. . . ." In other words, the Court learned from the Brandeis brief just how widespread was the belief, both among medical experts and the general community, about women's physical capacity upon which it rested its decision upholding the Oregon law.

DID the testimony of social scientists play a similar role in the 1954 segregation cases nearly fifty years after the introduction of the Brandeis brief? The answer is in dispute, for Chief Justice Warren, in his opinion for the unanimous Court, did not, as I have said, refer directly to the testimony given by social scientists in the trial courts, but mentioned "modern authority" on the effects of segregating Negro children and in a footnote cited eight such authorities.

The segregation cases presented the Court with a new issue growing out of an old problem. The old problem was the admission of Negroes to state-supported schools from which they had previously been barred. Since 1938 the Court had held that a Negro was entitled to admission to state institutions of higher learning for whites if "equal facilities" were not provided in colleges and universities reserved for Negroes. In a series of cases, the Court had given an increasingly stricter interpretation of what constituted "equal facilities," until in 1950 it declared unanimously that a Negro had to be admitted to the University of Texas Law School because the state's law school for Negroes was inferior in "those qualities which are incapable of objective meas-

urement but which make for greatness in a law school"—that is, in reputation of the faculty, school tradition and prestige, and influence of the alumni. The new issue before the Court was double-barreled: Would the Court require that Negroes be admitted to white schools below the university level? Would the Court accept the argument advanced by the lawyers for the National Association for the Advancement of Colored People (backed by an impressive number of other organizations) that segregated facilities can *never* be equal facilities?

In the Federal and state courts in which the cases were argued before they reached the Supreme Court, social scientists were called to the witness stand to testify as experts about the ill effects of segregation on the Negro children's personalities—the "intangible" factors. (Other educators were called upon for traditional testimony concerning what the Supreme Court called the "tangible" factors of equal school facilities: plant and equipment, teaching staff, library, and services.) Herbert Hill and Jack Greenberg, associated with the NAACP in these cases, have pointed out the advantages of the oral testimony in the *Citizen's Guide to De-Segregation* (Beacon, 1955): "Much of the same information" given by the social scientists on the stand, they remark, "could have been culled from books and articles and placed in the briefs. But the live witnesses produced a different effect. They could talk about the specific children and schools in the cases. Educators inspected the schools; social scientists examined some of the children who were plaintiffs. The experts were cross-examined, and their testimony was subject to rebuttal; this gave the defendants [arguing for the legality of segregation] a certain opportunity but it enhanced the persuasiveness of the testimony if it could not be shaken."

When the cases reached the Supreme Court in 1952, the NAACP appended to its brief a statement signed by thirty-two sociologists, anthropologists, psychologists, and psychiatrists in which two conclusions were emphasized: (1) segregation adversely affects both white and Negro children; (2) desegregation (which presents problems of execution that firmness will overcome) will lead to "more favorable attitudes and friendlier relations between races." The social scientists directed their comments not to the "moral and legal issues" but to the

"factual issues" of the "consequences of segregation" and the "problems of changing from segregated to unsegregated practices." They were frank to acknowledge that some of these questions are not finally resolved but lie "on the frontiers of scientific knowledge." They added, however, that all of them were "in agreement that this statement is substantially correct and justified by the evidence, and the differences among us, if any, are of a relatively minor order and would not materially influence the preceding conclusions."

IN HIS opinion for the unanimous Court, Chief Justice Warren was cautious and brief but clear. At the outset, he stated that the issue was not whether the facilities in the Negro schools were equal to those in the white schools "with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors." What was at issue was whether the doctrine of the Plessy case of 1896, that the provision of "separate but equal" facilities in public accommodations did not violate the Fourteenth Amendment, was applicable to public education in 1954. "We must look," he said, "to the effect of segregation itself on public education." He then reviewed briefly the importance of public education today in the community and to the individual; in this he relied on common knowledge, without referring to special studies or social science data.

He next turned to the real issue: does segregation mean inferior educational opportunity for Negro children even if the "tangible" facilities are equal? "We believe," the Court said, "that it does." In coming to this conclusion, the opinion cited the "intangible considerations" upon which the 1950 law school decision was made. "Such considerations," it went on, "apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." But here Chief Justice Warren felt less sure of general agreement. On the importance of education to the nation and the individual, he could rely confidently on what all of us know and none would deny. On the effects of segregation, however, the community is divided, as evidenced by the segregation laws themselves, the legal arguments in their defense, and the

attitudes of many whites in the North as well as in the South. So the Court turned to social science to support its belief about the harmful effects of segregation: "Whatever may have been the extent of the psychological knowledge at the time of *Plessy vs. Ferguson* [in 1896] this finding is amply supported by modern authority." Whereupon Justice Warren cited some social scientific studies. In overturning the separate-but-equal doctrine that had prevailed for more than half a century, the Chief Justice was careful to go only as far as necessary: "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." The ground on which the decision rests is made quite clear in the very next sentence: Negroes are, "by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."

THE Court seems to have reasoned somewhat as follows: (1) Public education is vital to the nation and the individual—no one would dispute this. (2) Segregation of Negro children impairs their education. Not everyone agrees that this is so, nor among those who do believe it is there agreement on the extent of the harm segregation causes; but those qualified to judge these matters believe that segregated facilities do mean unequal facilities. The Court, too, finds that it does. (3) Inequality in public educational facilities violates the Fourteenth Amendment.

Where does this line of reasoning base itself upon the findings of social science? In the second step. The Court took the position that segregation is *inherently* unequal—that is, the very act of enforced segregation implies, as the lone dissenter in the *Plessy* case put it in 1896, that "colored citizens are so inferior and degraded that they cannot be allowed" to commingle with whites in public facilities. But, aware that the nation was not unanimous on this point, the Court sought to buttress its position by referring to what it must have considered the best knowledge on the subject. The Court was not compelled to mention the "modern authority" it did in footnote eleven; it could simply have stated, quite baldly, that it took "judicial notice" of the fact that segregation means inequality, and relied, as it did, on the equal-protection clause of the Fourteenth Amendment. But the Justices chose to take ac-

count of research findings in exactly the same way that their predecessors took account of the data in Brandeis's brief: to buttress their "judicial notice" of the effects of a social situation at the moment of the decision rather than at some earlier time. To outlaw the practice of segregation, the Court relied on a series of precedents for interpreting the Fourteenth Amendment, not on sociology and social psychology. The Court made its own assessment of the meaning of public education and of segregation *in our time*, (not, as Chief Justice Warren plainly said, in "1868 when the Amendment was adopted, or even . . . 1896 when *Plessy vs. Ferguson* was written"); though it was probably aided in this assessment by the testimony social scientists gave in the lower courts, to which the Supreme Court obliquely referred but which it could have ignored completely without changing its decision in the slightest.

Although we can only guess the effect the testimony of the social scientists had upon the Court, we can feel more certain about evaluating that testimony itself. Both the oral testimony given in the lower courts, and the studies cited as "modern authority" in Justice Warren's footnote eleven, are very weak indeed and inspire no great confidence. Very little research, good or bad, has been done on just the point that the social scientists were trying to establish: the harmful effect of enforced segregation upon the personalities of Negro children. Of the seven books and articles mentioned in the footnote, only two deal directly with this issue, and they only review the meager data on it. One of these, *Personality in the Making* (edited by H. L. Witmer and Ruth Kotinsky, 1952) plainly admits: "There has not been much scientific research on the effects of prejudice and discrimination on personality formation." Another study cited by the Court reports the opinions of 517 social scientists as to the effects of segregation on personality; 90 per cent said its effects were harmful. Asked on what they based their opinion, whatever it might be, 29 per cent cited their own research. It was odd, as Professor Isidor Chein, who conducted the survey in 1947, pointed out, that so many social scientists should have claimed to have done research on the subject when only a "negligible" amount of material had appeared in print. A survey of the literature just completed by Professor Melvin Tumin (*Segregation and Desegrega-*

tion: *A Digest of Recent Research*, Anti-Defamation League, 1957), turns up no more than a piece or two of recent research.

It is fortunate that the Supreme Court, although it seems to have been influenced to some degree by the social scientists, did not rest its protection of the rights of minorities on the largely irrelevant books and articles cited in footnote eleven or on the need to establish as a fact that segregation has a harmful personality effect. As Professor Edmond Cahn of the New York University Law School has pointed out, until now we have been entitled to equality under law even if inequality was *not* harmful. If later decisions hold that the Supreme Court in 1954 rested its opinion on the social scientists' evidence of damage to personality, then we may reach a point where we shall be entitled to equality under law *only* when we can show that inequality has been or would be harmful. The point is that segregation *itself*, irrespective of its consequences, signifies inequality, an illegal, immoral, and scientifically unwarranted proclamation of inferiority. The danger of resting the right to equality under the law upon the ability to prove damage is perversely illustrated in an argument recently advanced by two Southern lawyers (one of them the Attorney General of Georgia). Reminding their readers that the Supreme Court considered that segregation of Negro school children "may affect their hearts and minds in a way unlikely ever to be undone," the authors comment: "Absent from the opinion was reference to the effect on the hearts and minds of white children and their parents because of enforced commingling with Negro children." This is the garden path down which the argument about damage to personality leads one. Our right to equality must be protected even if, in someone else's judgment, it does us no good, or even harms us.

Nonetheless, despite its weak role in the segregation cases, social science can play a useful part in the courts, both to enable judges to interpret legislation in the light of current social needs and to establish facts in dispute. Surprisingly, there has been little cogent analysis by lawyers or social scientists of its part in the segregation cases or in others. Among the more able legal commentators were the late Judge Jerome N. Frank and Professor Cahn. Both have deflated the notion that the Court's opinion was based on the findings of social

science. Both approved the Court's reliance upon a combination of constitutional provisions and judicial precedent, feeling that social science was far from ready to provide the kind of certainty about human behavior which they considered the law requires of its auxiliary disciplines. "The basic trouble" with social science, Judge Frank said, is that its "generalizations relate to the customs and group beliefs (the mores, the folkways), matters which, especially in a changing modern society, are not readily predictable, because of the numerous elusive and accidental factors. . . ." Professor Cahn asserts: "Among the major impediments continually confronting this science* are (1) the recurrent lack of agreement on substantive premises, and (2) the recurrent lack of extrinsic, empirical means for checking and verifying inferred results."

Let us concede these strictures and admit that social science generalizations based upon study of some human beings and groups are not easily applied to others. A simple question remains: do we have more reliable knowledge of human behavior than social science offers? I do not think so.

When they point to the weaknesses of social science, some legal scholars display a misconception about science in general. They seem to want a body of data that is error-proof. There is no such body of data even in the physical sciences. All the sciences make tentative statements of relationships that are frequently upset by new findings or are encompassed by new generalizations. The fact that scientists (social scientists among them) offer their findings modestly, and with the contrary evidence carefully noted, does not detract from the logical superiority of their methods and conclusions. Lawyers, judges, and journalists, for example, are more addicted to pontification and bald assertion, but this does not make their reasoning or their methodology any more reliable. Scientific humility is humility in the face of what remains to be learned and understood; it is not humility before other kinds of approaches or claims. Users of science (especially of social science) are often misled by its humility into believing that there is a better way to learn about the external world or about human behavior. But as Professor Cahn concludes, the issue about social science in the

*Professor Cahn is referring to social psychology, but I am sure he would make the same judgment of all social science.

courts is not *whether* it shall be used but *how*. "We ought," he says, "no longer debate the general admissibility of testimony from authentic social-science sources; on the contrary, we ought to welcome and encourage evidence of this kind. Our studies and criticisms should be addressed rather to considerations of weight and materiality."

Nor all lawyers welcome social science in the manner of Judge Frank or Professor Cahn. As a profession, they have been no less protective of their own domain than the other professions. As Morris Ernst recently pointed out: "Other experts are often better qualified than we—or at least as well—for the human problems which come before us. Yet the legal profession jealously guards its traditional prerogatives against 'intruders' from other fields." Lawyers are still skeptical of testimony from physicians even though the courts have long admitted it to a place of importance. Recently, for example, New York City courts experimented with the appointment, by the judge in personal injury trials, of a physician from a panel established by the New York Academy of Medicine and the New York County Medical Society. Reporting the success of the innovation, a special committee of the New York City Bar Association remarks that, even in the case of so venerable an art and science as medicine, "A few judges and lawyers have been disturbed by the special status occupied by an impartial expert. They feel that . . . he may usurp the functions of judge and jury. Medicine, they argue, is not an exact science. . . ." Nor, we might add, is law. So long as judges must be learned only in law, they cannot help but rely on experts when the law, as it does to an increasing degree nowadays, touches human relations in all their ramifica-

tions and complexities, from mental states to the nature of the physical world in which we live.

Yet there is no doubt that the social sciences will be called on more and more to testify in judicial proceedings. Are they up to it? This is hardly the question. No science or art is "up" to all that may be demanded of it. Two fundamental points are clear. First, law shows increasing need of knowledge of human behavior. Second, social science is our best—even if it is not a perfect or even reasonably satisfactory—means of acquiring such knowledge. Not all social scientists are happy about such a prospect. The profession as a whole feels a pressure toward objectivity which many fear would be compromised by a role in "practical" affairs. Doubtless, too, some social scientists fear the possibility of disclosing to public view the inadequacies of their discipline more than they fear a compromise of their "objectivity." These groups are very likely a minority. Even if they are not, they will have to stand the test. Social scientists must have the courage of their conviction that they are dealing more reliably than anybody else can with human behavior. Without equating "pure" with "applied" science, I suspect that a social science with no relevance or usefulness in "practical" affairs is not likely to be of much use as a "pure" science either. At the turn of the century Justice Holmes pointed the moral both for law and social science when he wrote: ". . . in the law we only occasionally can reach an absolutely final and quantitative determination, because the worth of competing social ends which respectively solicit a judgment for the plaintiff or the defendant cannot be reduced to number and accurately fixed. . . . But it is of the essence of improvement that we should be as accurate as we can."